

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

WALTER W. THIEMANN, on
behalf of himself and
of all others similarly
situated,

Plaintiff,

VS.

CASE NO. C-1-00793

OHSL FINANCIAL CORP.,
OAK HILLS SAVINGS AND
LOAN COMPANY, F.A.,
NORBERT G. BRINKER,
KENNETH L. HANAUER,
WILLIAM R. HILLEBRAND,
ALVIN E. HUCKE, THOMAS
E. MCKIERNAN, JOSEPH J.
TENOEVER, HOWARD N.
ZOELLNER, PROVIDENT
FINANCIAL GROUP, INC.,
ROBERT L. HOVERSON,
JACK M. COOK, THOMAS D.
GROTE, JR., PHILIP R.
MYERS, JOSEPH A. PEDOTO,
JOSEPH A. STEGER,
CHRISTOPHER J. CAREY,
CLIFFORD ROE, and
DINSMORE & SHOHL, LLP,

Defendants.

COPY

DEFENDANT'S
EXHIBIT

5

Hearing held by Magistrate Judge Hogan
taken by me, Lee Ann Williams, a Registered

1 Professional Reporter and Notary Public in and
2 for the State of Ohio, on Wednesday, June 16,
3 2004, at 1:06 p.m.

4
5 APPEARANCES:

6 On behalf of the Plaintiffs:

7 Gene Mesh, Esq.
8 and
9 Michael G. Brautigam, Esq.
10 Gene Mesh & Associates
2605 Burnet Avenue
Cincinnati, Ohio 45219

11 On behalf of the Defendants:

12 Rachel Rowe, Esq.
13 Keating, Muething & Klekamp
14 1400 Provident Tower
One East Fourth Street
Cincinnati, Ohio 45202

15 On behalf of the Defendants:

16 James Greer, Esq.
17 Bieser Greer Landis
400 National City Center
Six North Main Street
Dayton, Ohio 45402

18 On behalf of the Defendants:

19 John W. Hust, Esq.
20 Schroeder, Maundrell, Barbieri
& Powers
21 110 Governor's Knoll
11935 Mason Road
22 Cincinnati, Ohio 45249

23 ALSO PRESENT: John Wirthlin
24 Laura Wilson
- - -

1 MAGISTRATE HOGAN: I thought what
2 we might do to start is -- do you all have
3 copies of Mike's letter?

4 MS. ROWE: Yes, Your Honor.

5 MAGISTRATE HOGAN: I thought we
6 might go down the list right now, because I
7 checked with Judge Beckwith on these issues and
8 I can answer these questions pretty quick. We
9 can talk about point number one in a minute if
10 you want to.

11 Number two is for Judge Beckwith.
12 She's going to decide that so that's not for
13 me, document 280. Three and four are for us.
14 Number five is for Judge Beckwith. And as I
15 recall, the rationale behind it is that two and
16 five impact motions that are pending before her
17 and so she wants to do the whole thing.

18 Number six, I think document 328,
19 at least in Judge Beckwith's opinion is moot.
20 329 isn't, but for her. So I think what we
21 might talk about is in reverse order. What
22 about document 305, Plaintiff's Motion to
23 Strike the Errata Sheet that apparently
24 followed Mr. Brinker's deposition.

1 And it would be helpful to know
2 exactly how Mr. Brinker's deposition is being
3 used in the case. I mean, is it supportive of
4 some motion or what? I mean, so that -- that
5 would be helpful for us, anyway, so go ahead.

6 MR. BRAUTIGAM: Well, Your Honor,
7 it's fully briefed. As you know, because you
8 presided over Mr. Brinker's deposition, Mr.
9 Brinker had a lot of things wrong. He seemed
10 to be confused, not so much by the questioning,
11 but by his recollection.

12 Shortly after you ruled that Mr.
13 Brinker would not be allowed to be deposed
14 again, KMK submitted an errata sheet that
15 changed his testimony in its entirety. What
16 he -- when he said 17 years, it became five
17 years.

18 Plaintiffs respectfully submit
19 that those changes could not have been made by
20 Mr. Brinker himself, that this was KMK
21 completely, and that the deposition is not a
22 take home exam, as the case law suggests. And
23 that plaintiffs are entitled to have his
24 recollection, his testimony, not KMK's

1 recollections of his testimony. And to that
2 extent, our document speaks for itself.

3 MAGISTRATE HOGAN: How -- do you
4 plan to use Mr. Brinker's deposition in some
5 way?

6 MR. BRAUTIGAM: Yes, Your Honor.
7 I plan to use it at trial if Mr. Brinker is not
8 available. I plan to use it in, in many ways,
9 but certainly at trial. I believe we've
10 already heard Mr. Brinker's deposition with
11 motions for summary judgment, particularly with
12 respect to unanimity.

13 He's the chairman of the Board,
14 he's a key witness and plaintiffs are entitled
15 to have an accurate recitation of his
16 testimony, not KMK's corrections.

17 MAGISTRATE HOGAN: Okay. So in
18 other words, the theory is if Mr. Brinker is
19 unable to testify at trial, you want to use the
20 uncorrected version of his deposition?

21 MR. BRAUTIGAM: Yes, Your Honor.

22 MAGISTRATE HOGAN: And if he does
23 testify at trial, you want to use the
24 uncorrected version of his deposition to

1 impeach him?

2 MR. BRAUTIGAM: Yes, Your Honor.

3 MAGISTRATE HOGAN: Right?

4 MR. BRAUTIGAM: And also it's
5 entirely improper, based on the Federal Rules
6 and based on case law, to treat a deposition as
7 a take home exam, and that's exactly what he
8 did. It's also particularly egregious in this
9 case given the timing, that these corrections
10 were made shortly after your order saying that
11 Mr. Brinker is not coming back.

12 MS. ROWE: Your Honor, of course
13 we disagree with Mr. Brautigam's
14 characterizations, first of all, of the errata
15 sheets and the corrections that were made. I
16 think Mr. Brautigam said that it changed his
17 testimony in its entirety. That's completely
18 false.

19 You did preside over the
20 deposition, you know exactly what happened.
21 You know the efforts that were made to confuse
22 Mr. Brinker, who is very old and infirm and had
23 obvious difficulty dealing with the setting.
24 But our position, frankly, is that that motion

1 is fully briefed and unless Jamie has something
2 to add, I don't think we have anything to add.

3 MR. GREER: I wouldn't add
4 anything, Your Honor. This seems to me to be
5 an issue of impeachment. And if we have to
6 cross this bridge at trial, if Mr. Brinker is
7 not available, we can cross it then. But as
8 far as striking the errata sheet right now,
9 that's fully briefed and before you.

10 MAGISTRATE HOGAN: Okay. Let's
11 see, next week is what -- Monday?

12 MS. WILSON: Monday is the 5th.

13 MAGISTRATE HOGAN: I'll be back
14 here on the 7th and 8th. Okay. This can be
15 decided by the 15th of the month. I commit to
16 you that it will be done by then. The errata
17 sheet is, is -- his deposition is filed and the
18 errata sheet is part of it, I take it, right?

19 MS. ROWE: Correct.

20 MAGISTRATE HOGAN: Okay. So much
21 for that. What about document 302, the motion
22 to quash the subpoena?

23 MR. BRAUTIGAM: Your Honor, Mr.
24 Tayfun Tuzun is a gentleman who works at

1 Provident. He was integrally involved with the
2 restatement issues and plaintiffs not
3 surprisingly would like to depose him.
4 Somewhat surprisingly, Ernst & Young, which is
5 now a nonparty, filed the motion to quash the
6 subpoena.

7 MAGISTRATE HOGAN: Meaning that
8 Judge Beckwith granted a motion to dismiss
9 Ernst & Young?

10 MR. BRAUTIGAM: Yes, Your Honor.

11 MAGISTRATE HOGAN: I'm not up on
12 this.

13 MR. BRAUTIGAM: And also KMK, Your
14 Honor, entirely on statute of limitations
15 grounds -- or largely on statute of limitations
16 grounds.

17 MAGISTRATE HOGAN: All right.

18 MR. BRAUTIGAM: So KMK and Ernst &
19 Young are no longer defendants. They're
20 nonparty witnesses, I guess.

21 MAGISTRATE HOGAN: So go ahead.
22 He works for Provident?

23 MR. BRAUTIGAM: Yes, Your Honor.
24 He works for Provident. He submitted

1 affidavits on Provident's behalf and naturally
2 we'd like to depose him. We believe that he's
3 a key player with respect to the restatement
4 issues. And as I mentioned, Ernst & Young, who
5 is now a nonparty, filed the motion to quash
6 the subpoena.

7 MAGISTRATE HOGAN: So does anybody
8 care about the deposition of --

9 MS. ROWE: You know, I -- E&Y,
10 obviously, moved to quash the subpoena. I
11 believe it was fully briefed. We -- I can't
12 recall, to be honest with you, if we filed a
13 formal response. However, we took no position
14 and we are comfortable with whatever the Court
15 decides on whether the deposition should go
16 forward.

17 I will say, however, though that
18 motions to dismiss are still pending and
19 while -- while that is happening, I think that
20 discovery on issues that are related to the
21 pending motions to dismiss -- particularly with
22 respect to Mr. Hertlein, who is a new defendant
23 in the case and theoretically could -- claims
24 against him could be impacted by the Tuzun

1 deposition, at least theoretically, I suppose
2 it would be our position that discovery, to the
3 extent it impacts new defendants and claims
4 that remain the subject of pending motions to
5 dismiss, discovery shouldn't generally go
6 forward.

7 MR. GREER: Right, under PSLRA.

8 MR. BRAUTIGAM: Your Honor, may I
9 respond briefly?

10 MAGISTRATE HOGAN: That was the
11 same argument that Ernst & Young had, right?

12 MR. GREER: Yes.

13 MAGISTRATE HOGAN: Yes, go ahead.

14 MR. BRAUTIGAM: Your Honor, may I
15 hand you document number 221? This is the
16 Court's order, and I respectfully submit that
17 this is the root of many of the problems
18 because, as you can see, the scheduling order
19 calls for the Court's decision on the motions
20 to dismiss by April 30th, 2004.

21 MAGISTRATE HOGAN: Yes.

22 MR. BRAUTIGAM: That hasn't
23 happened. And this is where the case has been
24 thrown somewhat into disarray. So, Your Honor,

1 respectfully on behalf of the plaintiffs, we
2 thank you very much for meeting with us because
3 we really do need some guidance. Now, from the
4 beginning of the case, the Dinsmore defendants,
5 the Provident defendants, all of the defendants
6 have said more delay is not a problem, nobody's
7 prejudiced. They've said this for literally
8 years.

9 The schedule contemplates that
10 discovery would move forward on May 1st, and
11 that hasn't happened. And it's been two months
12 now and we are prejudiced. So, Your Honor, we
13 are seeking some guidance as to how we can
14 proceed, against whom we can proceed.

15 It's really an open question. And
16 once again, I thank you for your time because
17 this is a big issue and I respectfully submit
18 it needs to be resolved now.

19 MAGISTRATE HOGAN: Okay. You
20 don't remember if you took a position in
21 relation to the --

22 MS. ROWE: You know, it was a
23 little bit of a strange situation because I
24 think Mr. Brautigam and counsel for E&Y agreed

1 to do it in letter briefs rather than formal
2 briefs. And at the time we were exchanging
3 letters with one another and with the Court.

4 But the position that we have
5 today and that we've had all along, I just
6 don't recall if it was in a filing, is that
7 whatever the Court decides with respect to the
8 Tuzun deposition, we're fine with.

9 We understand E&Y's position and
10 the general notion that because there are
11 pending motions to dismiss under PSLRA,
12 discovery should not go forward on issues
13 related to those pending motions. But beyond
14 that, if you decide that it's appropriate for
15 the Tuzun deposition to go forward at this
16 point, we don't have a problem with it.

17 MAGISTRATE HOGAN: I think Mike's
18 right about -- I tried to commit for Judge
19 Beckwith, based on prior, I guess, behavior.
20 It apparently got bogged down with other stuff,
21 so that was a problem.

22 MS. ROWE: I will say on one other
23 issue that complicates this, at least to some
24 extent, Mr. Brautigam, as you know, has filed a

1 motion for leave to have interlocutory
2 appeal -- or you may not know that, related to
3 the orders dismissing both KMK and Ernst &
4 Young.

5 And so theoretically, if Judge
6 Beckwith permits an interlocutory appeal, her
7 decisions dismissing those two parties could be
8 impacted one way or another. And, again, it
9 makes ongoing discovery related to claims
10 against those two former parties somewhat
11 troubling, at least in the opinion of the OHSL
12 and Provident defendants.

13 MAGISTRATE HOGAN: Okay. Again,
14 that can be -- that's a simple issue, too.
15 Seems to me it can be resolved by the 15th. I
16 mean, I can commit for myself, so that will be
17 done. I don't want to spend a lot of time on
18 the Pat Fischer letter, but -- because I
19 remember this from before. Go ahead.

20 MR. BRAUTIGAM: Your Honor, the
21 sole purpose of that letter, in violation of
22 the Federal Rules and the Local Rules, is to
23 call me names. Just yesterday Mr. Fischer,
24 through counsel for KMK, Barrett & Weber, did

1 exactly the same thing with a notice of filing,
2 it attaches the letter.

3 The sole purpose is to call me
4 names. And we'll be filing a motion to strike
5 later this week for exactly the same reasons.
6 It's improper. They should be held to the same
7 standards that plaintiffs are held to, and it's
8 simply outrageous that they would violate the
9 Local Rules merely to attempt to trash me,
10 which is the sole purpose of document 204. And
11 it's the sole purpose of the document that was
12 filed yesterday.

13 MS. ROWE: I don't represent KMK.
14 In my mind the record as reflected in filings
15 from every party in this case speaks for
16 itself.

17 MAGISTRATE HOGAN: I'm -- I'm
18 perplexed as to how you can strike something
19 that's never been docketed or part of the
20 record in the first place.

21 MR. BRAUTIGAM: Well, Your Honor,
22 the full title of the document is Motion to
23 Strike or Otherwise Not Consider. And it's not
24 a pleading, so technically the Court is

1 correct, but we believe that there should be
2 something on record that Mr. Fischer's behavior
3 was inappropriate, that it's in violation of
4 the Local Rules, and that should be reflected
5 in the official Court docket.

6 MAGISTRATE HOGAN: Well, it's been
7 a while since I've read Pat Fischer's letter.
8 And I don't really recall exactly what the
9 point was, but I don't think you can strike
10 anything that's not been docketed or part of
11 the record in the first place.

12 Now, you know, preclude the Court
13 from considering the contents of Pat Fischer's
14 letter. I don't see, you know, how that
15 impacts any issue in the case. I don't have it
16 in front of me and it's been a while since I've
17 read it. Have you got it? What's he say?

18 MR. BRAUTIGAM: I don't have it
19 with me, Your Honor. Essentially he calls me
20 names. And not only does he call me names, but
21 it's false. Mr. Fischer apparently realized
22 that his conduct was improper, he chose not to
23 write in response to my letter correcting the
24 record and he chose not to file anything in

1 response to our motion to strike. Your Honor,
2 it's a minor point and obviously the Court will
3 make a decision on it.

4 MAGISTRATE HOGAN: Yes, here's my
5 decision. I'm going to sua sponte strike the
6 motion to strike as silliness and recommend,
7 Mike, if you think he's calling you names, why
8 don't you write Pat a letter and call him names
9 and then leave the Court out of gross
10 silliness, all right?

11 Now, let's go to page two. And I
12 don't know exactly what you mean here. Ernst &
13 Young is out of it, so point seven is moot.

14 MR. BRAUTIGAM: No, Your Honor.

15 MAGISTRATE HOGAN: It isn't? Go
16 ahead.

17 MR. BRAUTIGAM: Your Honor, as we
18 now know, Ernst & Young is no longer a
19 defendant.

20 MAGISTRATE HOGAN: All right.

21 MR. BRAUTIGAM: That doesn't mean
22 they shouldn't be witnesses in the case. I
23 spoke with Mary-Helen Perry of Jones Day and I
24 said I'd like to take the deposition of the

1 engagement partner on the account related to
2 restatement issues.

3 She wrote back and graciously
4 agreed to accept the subpoena, but said that
5 she does not believe that any discovery should
6 go forward during the pendency of all of the
7 motions to dismiss. So, Your Honor, there is
8 where the current schedule cannot be reconciled
9 any longer --

10 MAGISTRATE HOGAN: Okay.

11 MR. BRAUTIGAM: -- with the
12 scheduling order and where we need guidance.

13 MAGISTRATE HOGAN: Okay.

14 MR. BRAUTIGAM: So it's not moot,
15 and we need help.

16 MAGISTRATE HOGAN: Anybody have
17 anything to say about that? I don't see any
18 reason to delay discovery with Ernst & Young.
19 And I'll put that in the order, Mike, but I see
20 no point in playing around with it now.

21 They're out of it, so -- what about eight, KMK?

22 MR. BRAUTIGAM: Your Honor, it's
23 essentially the same thing. Mr. Fischer wrote
24 me a similar letter, at least in content,

1 saying, hey, we don't believe that any
2 discovery should go forward during the pendency
3 of all of the motions to dismiss.

4 MS. ROWE: I think there was a
5 notice of filing of Pat Fischer's letter
6 yesterday. And as I understand it, you have it
7 before you. KMK is not here, they're not
8 represented. They're not a party in the
9 action.

10 And as I understand from the
11 letter that was filed with the Court, as a
12 nonparty, they didn't think that it was
13 appropriate or that they were even invited or
14 permitted to be at the status conference. But
15 I -- in my mind, OHSL and Provident and the
16 directors don't have anything to say on behalf
17 of KMK or the discovery. I think that the
18 filing yesterday probably speaks for itself.

19 MR. BRAUTIGAM: Your Honor, and I
20 object to that filing. I'm going to file a
21 motion to strike that as well. It's almost
22 exactly the same content, except Mr. Fischer
23 put this in a filing called Notice of Filing.

24 It's improper and the content is

1 that he doesn't believe that any discovery
2 should take place with respect to KMK, just as
3 Ernst & Young did not believe, while any of the
4 motions to dismiss are pending.

5 MAGISTRATE HOGAN: I don't agree,
6 okay? So you win that one, too. Nine -- and
7 again, I'll put that in the order on the 15th.
8 PWC report.

9 MR. BRAUTIGAM: Your Honor, this
10 has come up in depositions and the press and
11 public documents. Provident has referred to
12 the PWC report to show essentially that they're
13 blameless, that these were all unintentional
14 errors, it's a big mistake, and we'd like to
15 obtain that record.

16 They're using it as a sword, not
17 as a shield. Mr. Burke had previously
18 indicated that this is a work product,
19 privileged document, he's not going to turn it
20 over. I then followed that up with a letter
21 and he said he would consider it and I simply
22 haven't heard back.

23 So once again, within the existing
24 schedule, which calls for discovery cut-off of

1 October 29th, 2004, we'd like to get this
2 matter resolved. If we engaged in a round
3 briefing schedule, that takes months, we're
4 going to be hurt.

5 MAGISTRATE HOGAN: Yes.

6 MS. ROWE: We are researching the
7 matter, Your Honor. It was a report that was
8 work product and we're researching whether we
9 have proper grounds to object to its production
10 to the plaintiffs. And we'll -- I can commit
11 that we'll let Mr. Brautigam know by -- is
12 today Wednesday?

13 MR. BRAUTIGAM: Yes.

14 MS. ROWE: By Friday in a letter
15 what position we're going to take.

16 MAGISTRATE HOGAN: Okay.

17 MS. ROWE: Okay.

18 MAGISTRATE HOGAN: So if you get
19 it, you're happy. If you don't, it's a motion
20 to compel.

21 MR. BRAUTIGAM: Yes, Your Honor.

22 MAGISTRATE HOGAN: Okay. Number
23 ten.

24 MR. BRAUTIGAM: Your Honor, you

1 seem to have largely covered that and I
2 appreciate it. Their role as nonparties while
3 motions to dismiss were pending is somewhat
4 ambiguous. I think you've clarified that.

5 MAGISTRATE HOGAN: Expert reports?

6 MR. BRAUTIGAM: Yes, Your Honor.
7 With respect to document 221 again, point five
8 identifies the deadline for the identification
9 of expert witnesses of August 30th and
10 September 30th, respectfully. I believe I have
11 an agreement in principle with Mr. Burke that
12 the August 30th deadline for the identification
13 of expert witnesses would also serve as the
14 deadline to turn over the reports. If that's
15 true, we'd like to finalize it.

16 I raised this issue with Mr. Hust
17 just today and I think he indicated that he
18 doesn't intend to produce expert reports, but
19 will identify the experts.

20 MR. HUST: That would be my
21 intention, Your Honor, unless you -- unless the
22 Court otherwise orders the --

23 MAGISTRATE HOGAN: It's a
24 practical thing, isn't it? The cut-off is

1 October 29th. We're trying to work this out so
2 that it's all done before the cut-off. So I
3 mean, I can move that around to accommodate
4 everybody, just --

5 MS. ROWE: Your Honor, we've
6 agreed to produce our expert reports on the
7 date that was indicated for identification --

8 MR. BRAUTIGAM: September 30th.

9 MS. ROWE: -- in writing with Mr.
10 Brautigam and I don't see any reason to discuss
11 it further now.

12 MAGISTRATE HOGAN: So is it just
13 you, John?

14 MR. HUST: Yes. I'd just as soon
15 not incur the expense. We'll make -- obviously
16 our experts will be available beginning October
17 1st for a deposition.

18 MAGISTRATE HOGAN: You have to
19 have a report first, you know. Can you do it
20 by September 30th? Do both the -- I mean, if
21 you have the report, you've designated the
22 expert, but --

23 MR. HUST: I think we can. If
24 there was some reason I would -- that some

1 slight delay was necessary --

2 MAGISTRATE HOGAN: No big deal.

3 MR. HUST: I'd ask Mr. Brautigam
4 or something first.

5 MAGISTRATE HOGAN: It wouldn't be
6 a problem as long as we get everything done by
7 October 29th.

8 MR. HUST: Okay.

9 MAGISTRATE HOGAN: Let's just say
10 those are reports instead of designations with
11 the understanding that if John needs more time,
12 it's not a big deal. Now what? Where are we?

13 MR. BRAUTIGAM: We're at point 12,
14 Your Honor.

15 MAGISTRATE HOGAN: Okay. KMK's
16 misbehavior at depositions.

17 MR. BRAUTIGAM: Your Honor, points
18 12 and 14 are related and we'll be filing a
19 motion to hold KMK in contempt for their
20 conduct at depositions later this week.

21 MAGISTRATE HOGAN: Okay. Now,
22 what's -- I mean -- how about starting with 13?
23 That seems like the easiest. You want more
24 than seven hours?

1 MR. BRAUTIGAM: Yes, Your Honor.
2 For some witnesses, we believe that seven hours
3 is appropriate. This is complex litigation.
4 It doesn't get much more complex than this.
5 Because of certain strategies that the
6 defendants have employed, things have taken
7 longer than normal. But plaintiffs obviously
8 submit that they're entitled to more than seven
9 hours with respect to some witnesses in the
10 case. And we'd like to get it.

11 MAGISTRATE HOGAN: Like who?

12 MR. BRAUTIGAM: Like Mr. Carey,
13 like Mr. Hoverson, the CEO and CFO of
14 Provident.

15 MAGISTRATE HOGAN: Anybody else?

16 MR. BRAUTIGAM: Yes, Your Honor.
17 Some of the other directors as well.

18 MAGISTRATE HOGAN: So have you --
19 I mean, have you run up against situations
20 where you've taken depositions and come up
21 short? What's the deal? Are you trying to --
22 are you trying to make a preemptive strike
23 here --

24 MR. BRAUTIGAM: No, Your Honor.

1 MAGISTRATE HOGAN: -- assuming you
2 need more time? Tell me what the deal is.

3 MR. BRAUTIGAM: No, Your Honor.
4 With respect to Mr. Carey, for example, I
5 believe I had close to the presumptive seven
6 hours, if not the entire presumptive seven
7 hours. I simply need more time.

8 With respect to Mr. Hoverson and
9 Mr. Cook, there is some period of minutes
10 remaining from the presumptive seven hours. I
11 think it's 50 something for Mr. Hoverson and
12 perhaps the same amount or something like that
13 for Mr. Cook. But I anticipate that I will go
14 past that, I will need to go past that given
15 the voluminous nature of the documents, et
16 cetera.

17 MAGISTRATE HOGAN: For how long?

18 MR. BRAUTIGAM: Perhaps another
19 day, Your Honor. I'd like to remind the Court
20 that in the state court litigation, some of the
21 OHSL defendants and witnesses were deposed for
22 several days.

23 MS. ROWE: Excuse me. That's
24 true. In fact, Mr. Hanauer was deposed for

1 four days, and 900 and some pages. And in our
2 minds, totally inappropriate as -- with respect
3 to the depositions of our clients that Mr.
4 Brautigam is talking about.

5 Seven hours is the presumptive
6 rule for a reason. Seven hours is plenty of
7 time in this and other complex litigation. And
8 to the extent that Mr. Brautigam wants more
9 time, we would suggest that he file a motion
10 and attach the deposition so the Court can see
11 how he spent the first seven hours. The
12 depositions speak for themselves.

13 Mr. Mesh has been present for a
14 portion of them and we would submit that
15 there's absolutely no reason to go beyond the
16 seven hour limit that's imposed by the Federal
17 Rules.

18 MR. BRAUTIGAM: Your Honor --

19 MS. ROWE: And that, frankly, it's
20 Mr. Brautigam's obligation to demonstrate to
21 the Court why he needs beyond that limit.

22 MR. BRAUTIGAM: Your Honor, I'd
23 first like to point out that it's a seven hour
24 presumption. And the case law, of course,

1 discusses the complexity of the case, the
2 voluminousness of the documents, all factors
3 that we have here. So I think you can make a
4 seat-of-the-pants decision on this, Your Honor,
5 since it's so obvious.

6 We don't want to be burdened by
7 filing more paperwork with the Court that takes
8 a long time to get resolved, given that the
9 clock is ticking with respect to the scheduling
10 order.

11 MS. ROWE: Well, Your Honor, there
12 are a number of factors, and motion practice is
13 appropriate, because one of the factors is how
14 he spent the first seven hours. And when he
15 asks the same questions over and over and takes
16 up two or three hours on subjects that
17 literally have not a single thing to do with
18 the claims that are pending in the litigation,
19 there's no reason that our clients should be
20 burdened with both the time and expense of
21 coming back beyond the seven hours.

22 And we would submit that you can't
23 make the decision by the seat of your pants
24 without, in fact, considering all of these

1 factors that Mr. Brautigam mentioned, including
2 looking at the depositions so far.

3 MR. BRAUTIGAM: Your Honor, we
4 would encourage you to look at the depositions
5 so far, and they've been filed with the Court.
6 And as I indicated, we are going to have a
7 motion to hold KMK in contempt for their
8 conduct, which actually Judge Beckwith invited,
9 filed later this week.

10 MAGISTRATE HOGAN: You know, I did
11 read the deposition of Mr. Brinker that was
12 taken in the state court before his deposition
13 here. And it was, seems to me, somewhere
14 around 800 pages. I mean, it took me three
15 days to read it. Three days that I might add
16 could have been better spent.

17 And I was relatively unimpressed
18 with the deposition of Mr. Brinker, too, I
19 might add. My feeling when I left that
20 deposition is probably 70 percent of what he
21 said was demonstrated by documents or could
22 have been.

23 And -- but I, I -- that's my
24 contact with this case in terms of depositions.

1 I haven't seen or read any of the depositions
2 of anybody else. If I recall this -- correct
3 me if I'm wrong -- Mr. Hoverson is still the
4 president of the bank, isn't he? Unless
5 something happened with the takeover here that
6 I don't know.

7 MR. WIRTHLIN: Tomorrow is his
8 last day, Judge.

9 MAGISTRATE HOGAN: Is he going to
10 be retired? Is he going to work for National
11 City, or what's the deal?

12 MR. WIRTHLIN: No, he's not going
13 to work for National City, he's retiring.

14 MAGISTRATE HOGAN: And the
15 directors are mostly retired people, I think.

16 MR. BRAUTIGAM: No, Your Honor,
17 not for Provident.

18 MAGISTRATE HOGAN: Are you talking
19 about the Provident directors when you said
20 directors?

21 MS. ROWE: Correct, he --

22 MAGISTRATE HOGAN: You said Carey,
23 Hoverson.

24 MR. BRAUTIGAM: Yes, Your Honor,

1 those are all Provident directors.

2 MAGISTRATE HOGAN: So they're
3 currently working people. Mr. Carey, what's
4 his status?

5 MR. WIRTHLIN: He is -- his last
6 day with Provident is tomorrow. And then he is
7 moving out of town to take a job in California.

8 MAGISTRATE HOGAN: Well, let's do
9 it this way. I just can't -- if these
10 depositions are anywhere near the length of Mr.
11 Brinker's, I just haven't got the time to read
12 them all. So -- and I can't conceive of -- I
13 don't consider this a particularly complex
14 case.

15 I don't know if any of you do, but
16 I don't. And 14 hours just seems off the wall
17 to me, so I'll give Mr. Brautigam a little
18 leeway and give him another hour. Eight hours
19 instead of seven. They could take a late lunch
20 or something. And that's it.

21 MR. GREER: Your Honor, just for
22 clarification, is that just the witnesses that
23 he mentioned or is that for any witness in the
24 case?

1 MAGISTRATE HOGAN: Carey, Hoverson
2 and the directors.

3 MR. GREER: Thank you.

4 MAGISTRATE HOGAN: Anybody else,
5 it would have to be established by need.

6 (Court and Clerk conferred.)

7 MAGISTRATE HOGAN: Provident, yes.
8 Good point.

9 MS. ROWE: Thank you.

10 MAGISTRATE HOGAN: Because I
11 thought Mike was talking about the OHSL
12 directors. The Provident directors.
13 Deposition conduct, I mean, I -- he says
14 speaking objections, refusal to answer
15 questions, refusing to interpret documents.

16 Why don't we take them one at a
17 time. I mean, I don't see any -- here's what
18 it says, KMK has repeatedly made speaking
19 objections that suggest an answer or suggest
20 that the witness not answer the question. For
21 example, objection, calls for speculation. And
22 then the witness says, I'm not going to
23 speculate on that.

24 I, I actually observed that during

1 the Brinker deposition, but I didn't attribute
2 any kind of misbehavior to the lawyer. I
3 thought some of the cases were where Mr.
4 Brinker was asked a question and he was trying
5 to analyze and Jim Burke made an objection that
6 said, based on speculation.

7 And then Brinker responded with,
8 well, that's speculation. I -- I think he was
9 having trouble making the connection between
10 the question and the answer. And that's the
11 last thing that was said to him, frankly.

12 I don't think that was any -- at
13 least it didn't appear to me to be any plan
14 between Burke and Brinker. But the obvious
15 preferable practice is to make your objection,
16 state the reason and then instruct the witness
17 to answer the question and let the Court
18 resolve it. So does anybody need any help
19 following that? I don't think so.

20 Refusal to answer questions? I
21 mean, the witness is supposed to be directed to
22 answer questions unless it's privileged. And
23 then there better be a good reason why he's
24 told not to answer the question. I don't know

1 about refusing to answer -- comment on a
2 question, refusing to answer it based on it's
3 not for me to interpret.

4 Well, I don't know if it is or it
5 isn't. It depends on what the document is and
6 what is asked. If you presented me with a
7 document from the Air Force Base and said
8 interpret it, I'd say what is this? If it's an
9 appropriate witness who was asked a question he
10 should know, it's different. I can't decide
11 that in a vacuum.

12 What else have we got?
13 Instructions not to answer questions, speaking
14 objections. I mean, what do you want me to
15 say? You're not supposed to trigger the
16 deponent's answer by telling them what to say
17 by virtue of an objection. That's not -- if
18 that happens, I suppose counsel should be
19 sanctioned and Mr. Brautigam should be given
20 another hour to question the witness who's
21 screwing around, trying to run out the time.

22 I mean, that's how I feel about
23 it. It's like we recently had with a jury that
24 I thought I had planned wonderfully in my head

1 for time limits in terms of the direct and
2 cross-examination of witnesses. And what I
3 think happened is, as a matter of strategy, one
4 counsel or the other determined that I'm going
5 to take up all the time here. And that almost
6 happened, so --

7 MS. ROWE: Well, Your Honor --

8 MAGISTRATE HOGAN: The next time
9 we did it, we had -- we counted the time
10 against the cross-examiner, which made --
11 eliminated that problem. But I don't know how
12 to resolve that, except to tell you that that's
13 universally accepted Rules that everybody
14 knows. And the deposition transcript would
15 show whether or not counsel is complying with
16 the Rules or not. If not, show me the
17 transcript.

18 MR. BRAUTIGAM: Your Honor, thank
19 you very much.

20 MAGISTRATE HOGAN: I'll spend the
21 time and make you -- and give you another
22 opportunity to ask the question.

23 MR. BRAUTIGAM: Your Honor, thank
24 you very much for that guidance. We believe

1 that this conduct was egregious. We'll be
2 filing papers to that effect later in the week.

3 MAGISTRATE HOGAN: Okay. Is that
4 it?

5 MR. BRAUTIGAM: No, Your Honor, a
6 few other things.

7 MAGISTRATE HOGAN: Oh, we have
8 more?

9 MR. BRAUTIGAM: First of all,
10 could we come back before the Court in about a
11 month? You've made some of these rulings and
12 we'd like to report back to see if any progress
13 has been made, because in the past we haven't
14 made progress. So could we come back, let's
15 say July 30th, and say, all right, I made these
16 rulings on June 30th, have any depositions
17 taken place, what's the status of the case.
18 Can we get another date to come back?

19 MAGISTRATE HOGAN: Sure.

20 MR. BRAUTIGAM: All right. I
21 would suggest July 30th, Your Honor.

22 MAGISTRATE HOGAN: I'd have to
23 look at the calendar.

24 MS. ROWE: That doesn't work, I

1 know, for me and Mr. Burke. I don't have Jim
2 Burke's calendar.

3 MAGISTRATE HOGAN: Well, why don't
4 we -- I'll show you ours. In fact, if you
5 want, you can make a xerox of it and then you
6 can --

7 MR. BRAUTIGAM: Your Honor, just
8 so we're clear, you talked about a written
9 order on or about July 15th.

10 MAGISTRATE HOGAN: July 15th.

11 MR. BRAUTIGAM: But orally you
12 have allowed plaintiffs to proceed with respect
13 to depositions and we can set that up?

14 MAGISTRATE HOGAN: Right. You
15 don't have to wait --

16 MR. BRAUTIGAM: We don't have to
17 wait for the order?

18 MAGISTRATE HOGAN: -- till the
19 15th. I just said for purposes of resolving
20 this, I want to put it all in writing and I'll
21 just go down the list in your letter.

22 MR. BRAUTIGAM: And we've
23 formalized the dates for the expert reports,
24 Judge. I think we've covered that, Your Honor.

1 And I thank you for your time.

2 MAGISTRATE HOGAN: Let's get the
3 date.

4 MR. MESH: Off the record.

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(Hearing concluded at 1:40 p.m.)

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C E R T I F I C A T E

I, Lee Ann Williams, a Notary Public in
and for the State of Ohio, do hereby certify
that the foregoing is a true and correct
transcript of the proceedings in the foregoing
captioned matter, taken by me at the time and
place so stated and transcribed from my
stenographic notes.

July 12, 2004

My commission expires:
August 26, 2004

Lee Ann Williams

Lee Ann Williams, RPR
Notary Public-State of Ohio